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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT PATRICK MCKINSTRY,

Defendant and Appellant.

F078924

(Super. Ct. No. SUF20553)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Mark V. Bacciarini, Judge.

Scott Patrick McKinstry, in pro. per.; Michael Sattris, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Detjen, Acting P.J., Smith, J. and Snauffer, J.

STATEMENT OF APPEALABILITY

This appeal is from an order denying a petition for recall of sentence and resentencing pursuant to Penal Code section 1170.95.¹ It is appealable pursuant to section 1237, subdivision (b), as an order after judgment affecting the substantial rights of the defendant. (See *Teal v. Superior Court* (2014) 60 Cal.4th 595, 601 [denial of petition for recall and resentencing appealable as order after judgment].)

STATEMENT OF THE CASE AND FACTS

“Senate Bill 1437 ... became effective on January 1, 2019” (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722.) It “addresses certain aspects of California law regarding felony murder and the natural and probable consequences doctrine by amending sections 188 and 189, as well as by adding section 1170.95, which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in law would affect their previously sustained convictions. (Stats. 2018, ch. 1015, §§ 2–4” (*Ibid.*)

McKinstry pro se submitted a petition for resentencing pursuant to section 1170.95 to the Merced County Superior Court, which it filed on January 4, 2019. That petition pertained to a judgment the court had imposed on June 19, 2009, pursuant to a 2008 conviction. McKinstry alleged that the court imposed that judgment following his jury conviction for second degree murder based on a theory of liability under the felony murder rule. He further alleged he could not now be convicted of murder because Senate Bill 1437 amended section 188 to provide, “Malice may not be imputed to a person based solely on his or her participation in a crime,” thereby abolishing the felony-murder theory of liability for second-degree murder.

McKinstry further alleged in this regard:

¹ Undesignated statutory references are to the Penal Code.

“Petitioner was prosecuted on two alternate theories of second degree murder: (1) express or implied malice murder, and (2) Second-Degree Felony-Murder with the predicate act of shooting a firearm in a grossly negligent manner, a violation of section 246.3, subdivision (a). The trial court instructed the jury on each theory. [Citation.] Petitioner objected to the felony murder instruction. [Citation.]”

“The jury rendered only two verdicts: the second degree murder verdict, and the true finding on the personal firearm use allegation. The firearm use finding simply shows the jury found that petitioner intentionally used a firearm during the commission of a crime. This finding does not suggest the jury found that petitioner acted with malice, because malice is not an element of the allegation. Moreover, this finding is entirely consistent with a finding that petitioner discharged a firearm in a grossly negligent manner, because evidence that he intentionally discharged a firearm can prove the firearm use allegation as well as an element of the section 246.3 offense. Thus, the jury verdict does not establish that the jury necessarily found petitioner harbored malice.”

“Under all the circumstances, there is reasonable doubt the jury made the findings necessary for a verdict based on malice.... [¶] Given the prosecutor’s prolonged, impassioned attempt to convince the jury to convict petitioner of the felony-murder, it cannot be said beyond a reasonable doubt that one or more jurors did not accept the prosecutor’s invitation to convict petitioner under the felony-murder theory. Certainly, it cannot reasonably be said that ... instructing the jury on felony-murder did not contribute to the verdict.”

McKinstry sought relief that would have included redesignation of his conviction as one in violation of section 246.3, subdivision (a), and that he be resentenced accordingly.

The superior court summarily denied the petition in a four-page ruling. Accepting *arguendo* McKinstry’s thesis that after Senate Bill 1437 a second-degree murder conviction can no longer be based on a felony-murder theory, the court

took judicial notice of and relied upon this court's unpublished decision on direct appeal to deny the petition. (*People v. McKinstry* (Mar. 4, 2011, F058270 [nonpub. opn.].)

In this regard, the superior court recounted that on direct appeal, McKinstry argued that the trial court had erred in permitting the jury to find guilt on a felony-murder theory because the merger doctrine applied to preclude a murder conviction based on that theory of liability where the underlying felony was assaultive. Further:

“The appellate court agreed and stated that the felony-murder theory could not be applied to petitioner's case. The appellate court, however, went on to hold that this error was harmless because the record demonstrated, beyond a reasonable doubt, the jury necessarily did or necessarily would have convicted petitioner on either the theory of actual malice or the theory of implied malice.”

The superior court (as had this court on direct appeal) also cited *People v. Chun* (2009) 45 Cal.4th 1172, which had similarly found error in instructing the jury on the second-degree felony-murder rule harmless, where “no juror could find felony murder without also finding conscious-disregard-for-life malice.” (*Id.* at p. 1205.)

McKinstry timely filed a notice of appeal from the order denying his petition.

APPELLATE COURT REVIEW

McKinstry's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that McKinstry was advised he could file his own brief with this court. By letter on July 3, 2019, we invited McKinstry to submit supplemental briefing. On July 29, 2019, McKinstry filed a brief which we have considered.

After independently reviewing the entire record, we have concluded there are no reasonably arguable legal or factual issues.

DISPOSITION

The judgment is affirmed.